

JAN 25 1979

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In the
Supreme Court of the United States

October Term, 1978

No. 78-329

FRANCIS X. BELLOTTI,
Attorney General of the
Commonwealth of Massachusetts, Et Al.,
Appellants

v.

WILLIAM BAIRD, et al.,
Appellees

On Appeal from the United States District Court
For the District of Massachusetts

BRIEF OF *AMICI CURIAE* CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS, THE MICHIGAN DISTRICT LUTHERAN CHURCH (MISSOURI SYNOD), THE MICHIGAN DISTRICT, CHRISTIAN REFORMED CHURCH IN NORTH AMERICA IN SUPPORT OF APPELLANTS FRANCIS X.' BELLOTTI, *ET AL.*

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This brief is submitted on behalf of the above-named *amici curiae* pursuant to the January 15, 1979 order of this Court granting *amici* leave to file a joint brief as friends of this Court. Pursuant to United States Supreme Court Rules 40 (3) and 42 (5), *amici* will not present independent statements respecting:

(1) the legal opinions below; (2) the jurisdictional basis of this action; (3) the constitutional and statutory provisions involved; (4) the questions presented for review; and (5) a summary of the facts of this case. Rather, *amici* adopt and incorporate by reference the statements made respecting these matters as contained in the briefs of Appellants Francis X. Bellotti *et al.* and Defendant-Intervenor Jane Hunerwadel.

The interests of *amici* in this case, as organizations concerned with parental and family rights, are clearly expressed in the Motion for Leave to File Brief submitted by *amici* on December 15, 1978, and granted by this Court on January 15, 1979. To the extent *amici* view the issues raised by this case differently from the Appellants and Defendant-Intervenor Jane Hunerwadel, those views will be presented in the following modified statement of the case.

STATEMENT OF THE CASE

STATEMENT OF THE ISSUES PRESENTED

The precise issue in the instant case is the constitutionality of Massachusetts General Laws, Chapter 112, §12S, which, narrowly construed, grants notification and consultation rights to parents of certain minor children contemplating abortion surgery. *Amici* respectfully submit, however, that a more thorough statement of the issues, and a refocusing of this Court's consideration, is necessary for analytical clarity in this case.

It is important to recognize that the primary interests at stake in this case are familial. It is Appellees' contention, sustained by the District Court, that the Massachusetts notification/consultation provision is an unconstitutional burden on a minor's right to have an abortion. Nevertheless, neither Appellees nor the court below have demonstrated any countervailing interest which is served by keeping concerned parents uninformed regarding the counseling and medical care of their children in fundamental matters concerning sex, morals, procreation, and even judicial proceedings in which their children might become involved. This fundamental failure to address the consultative and custodial role of parents is indeed striking since that is the dominant issue in this case, as well as the issue which distinguishes it from *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976).

In *Danforth* the issue was the constitutionality of a statute which required parental consent as an absolute prerequisite to the performance of abortion surgery on minors. Although the result in *Danforth* is not approved by your *amici*, it will not be questioned here. Rather your *amici* will demonstrate that the majority of the *Danforth* court would support the notification/consultation rights involved herein.

More importantly, however, it is submitted that the analytical approach employed in *Danforth* unnecessarily confuses the judicial consideration of the Massachusetts law, and similar parental rights statutes, because it fails to recognize and balance all of the interests involved. Furthermore, the *Danforth* decision

fails to adequately recognize well-established parental and familial rights, which are subject at all times to governmental protection as well as statutory or judicial limitation when the need arises.

Thus, in the view of your *amici*, this case involves four distinct sets of rights: those of the pregnant minor, her parents, the state, and the abortion provider. To assume at the outset that the interests of the minor and the abortion provider must be balanced against those of the parents and the state, would, in the view of your *amici*, resolve the case before it begins. Rather, the main issue of the case is the appropriate balance between the well-settled rights of all entities involved, and the articulation of the role of the parties once that balance has been found.

SUMMARY OF ARGUMENT

Amici Curiae, the Michigan District, Christian Reformed Church in North America, the Michigan District Lutheran Church (Missouri Synod), and the Catholic League for Religious and Civil Rights support the arguments of Defendant-Appellant Bellotti (hereinafter "the state" or "Massachusetts") because General Laws Chapter 112, § 12S, as inserted by Statute 1974, Chapter 706, § 1, and renumbered by Statute 1977, Chapter 397 (hereinafter "the statute") represents a laudable attempt on the part of the state to insure the integrity of the consultative process for minors contemplating abortion. In the view of your

amici it is this consultative process, its nature and content, and the role of the family unit in that process, which should be the focus of a reviewing court. That the process is educational is not open to serious question; and that most minors are particularly unsuited for making major life decisions is equally apparent. That plaintiff physicians stand to gain financially when a minor decides in favor of abortion is similarly clear.

The result of the decision below is to negate state power to assure that parents will have an opportunity to influence the decision-making processes of children who have already been "counseled" and supported by financially interested medical care providers who know virtually nothing of the minor's emotions, morals, religious background, or maturity. Pursuant to the District Court's order, a minor or abortion provider living in Massachusetts may effectuate a change in custody by the simple expedient of refusing to inform the minor child's parents. The court simply resolved any doubts concerning the need for parental input against the parents and the state.

In the brief which follows, your *amici* will develop what, they submit, is the correct analytical approach to the case at bar. First, this honorable Court should frankly recognize that there can be no exclusion of parents by the state or by third parties without violating fundamental familial interests; second, it should be recognized that the interests of minors are best served through a broadly based consultative process which includes parents; and third and most importantly, it should be recognized that, given the immaturity of most minors, the ques-

tion at bar is not an abstract notion of "minors' rights", but rather the question of *who* shall offer guidance. The choices are essentially three: the state, through its judges and social workers, the abortion provider, or the parents.

Amici Curiae respectfully submit that, in the absence of a showing of neglect or entry of a judicial order terminating the parents' custody, the constitutionally mandated first choice is the parents, and that by enacting Massachusetts General Laws Chapter 112, § 12S, the state has fulfilled not only its duty to protect the rights of parents, but also the best interests of pregnant minors. Finally, it will be demonstrated that, in any event, the parental notification/consultation rights involved in this case are compatible with the principles of the *Danforth* decision, and therefore should be sustained against constitutional attack.

ARGUMENT

I. PARENTS HAVE FUNDAMENTAL RIGHTS TO CONTROL, EDUCATE, NURTURE AND GUIDE THE ACTIONS OF THEIR MINOR CHILDREN WHICH ANTEDATE THE EXISTENCE OF THE STATE AND WHICH THE STATE IS CONSTITUTIONALLY EMPOWERED TO PROTECT.

A. The Rights of Parents And Their Children Are Well-Settled.

1. The Right of Family Integrity Is Fundamental.

Prior decisions of this Court establish that among the rights deemed "fundamental" is that of family integrity. *Griswold v.*

Connecticut, 381 U.S. 479 (1965), *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Pierce v. Society of Sisters*, 268 U.S. 519 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923). Until a compelling need for outside intervention is shown, neither the state, nor a third-party may interfere with intra-family choices or decisions. See, e.g., *Alsager v. District Court of Polk County, Iowa*, 406 F. Supp. 10 (S.D. Iowa 1975) *aff'd* 545 F.2d 1137 (8th Cir. 1976) (on substantive due process grounds); *Paige v. Bing Construction Co.*, 61 Mich. App. 480, 485-486, 233 N.W. 2d 46 (1975); *New Hampshire v. Robert H.*, 393 A. 2d 1397 (N.H. 1978).

In order to support the proposition that the Massachusetts parental consultation and consent provisions have a "chilling effect" on the rights of a minor, and that this Court should give its approval to a policy of parental exclusion, it must be assumed that, in the absence of evidence of individualized compelling need, the state has no power to "protect" a minor from her parents. In *Wisconsin v. Yoder*, 406 U.S. 205 (1972), the Supreme Court expressly rejected the idea that the State has a right to coerce or otherwise facilitate the defiance of parental authority by the minor because it disapproves of their beliefs and actions.¹

¹ In the case at bar, the courts have apparently adopted a euphemism to describe the process. The parents are told by the courts, that they may consider only the child's interests. Such a determination cannot be realist-

Recognition of the claim of the state. . . would, of course, call into question traditional concepts of parental control over the religious upbringing and education of their minor children recognized in this Court's past decisions. It is clear that such an intrusion by a state into family decisions in the area of religious training would give rise to grave questions of religious freedom comparable to those raised here and those presented in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

* * *

Indeed it seems clear that if the State is empowered, as *parens patriae*, to "save" a child from himself or his. . . parents; . . . the State will in large measure influence, if not determine, the religious future of the child. 406 U.S. at 231, 232.

Clearly, one of the major reasons for the Appellees' objection to parental involvement is fear that their "supportive" counseling will be diluted or negated by the exercise of parental influence and authority. It is well-settled, however, that the state may not interfere with either the parents' or childrens' rights to reject viewpoints the state deems desirable. When the Appellees' interest is to disseminate an ideology or sell a service, no

ically made without consideration of all the factors which a family considers in making important health decisions. Surely these include age, effect on the family, health, financial ability, religious and moral considerations, and the more generalized effect the decision may have on the impressionable minor herself. See *Doe v. Bolton* 410 U.S. 179 (1973). The District Court specifically pointed to parental "anti-abortion" feelings as not being in a minor's best interest. *Baird v. Bellotti*, 450 F. Supp. 997, 1001 (D. Mass. 1978). If this is not a federal attempt to insulate a child from governmentally disapproved notions of morality and conduct, it is difficult to conceive what is. Just as in *Wisconsin v. Yoder, supra*, the conclusion is inescapable that the policies envisioned by the District Court may contravene the basic privacy and religious rights of the intervening parents, and may well infringe upon the minor's rights as well. See 406 U.S. at 218.

matter how acceptable it might be in the eyes of well-meaning social workers or judges, such an intent or interest cannot outweigh the parents' First Amendment right to avoid becoming unwitting nonparticipants in the counseling and treatment of their children, as stated by this Court in *Wooley v. Maynard*, 430 U.S. 705 (1977):

A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts. The right to speak and the right to refrain from speaking are complementary components of the broader concept of "individual freedom of mind". . . The First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster. . . an idea they find morally objectionable. 430 U.S. at 714-15.

Even if *amici* give the District Court credit for its good intentions, and even though the governmental purpose to avoid illegal abortion is clearly a legitimate one, it is submitted that the governmental purpose may not be pursued by means that broadly stifle the parents' rights to influence the physical, religious, and moral upbringing of their children when the same end can be more narrowly achieved. *Wooley v. Maynard, supra*; *Shelton v. Tucker*, 364 U.S. 489 (1960).

In *State v. Whisner*, 47 Ohio St. 2d 181, 351 N.E. 2d 750 (1976), the Ohio Supreme Court considered, among other things, one of the minimum standards promulgated for Ohio elementary schools, which provided, in part, that "office records [containing "pertinent pupil information" such as level of

assignment, health, test scores, and confidential child study information] are not released to parents or guardians." The parents objected to the standard because they believed "it is very important for a parent to be apprised of everything occurring in school relating to his or her child or children." 47 Ohio St. 2d at 202. Striking down the regulation, the Ohio Court held:

The minimum standards under attack herein effectively repose power in the state Department of Education to control the essential elements of non-public education in this state. The expert testimony received in this regard unequivocally demonstrates the absolute suffocation of independent thought and educational policy, and the effective retardation of religious policy, engendered by these minimum standards. . . 47 Ohio St. 2d at 215.

Indeed, the federal government, recognizing the important role that parental consultation plays in the education of children, has enacted a comprehensive family educational rights statute which, among other things, grants parental access to minor students' educational records. 42 U.S.C. § 1232g (a) (1974). See Note, *Federal Genesis of Comprehensive Protection of Student Educational Record Rights: The Family Educational Rights and Privacy Act of 1974*, 61 Iowa L. Rev. 74, 93-104 (1975).

The District Court employed the unsupported argument that the parental consultation and consent procedure established by the Massachusetts Legislature will not improve relationships within the family, but it was incumbent upon the Appellees to

demonstrate that the policies *they* desire do not, themselves, undermine the family structure. By approving surreptitious conduct in an already stressful family situation, the District Court's perception of sound constitutional policy, "rather than preventing or healing a disruption, would quite likely serve as the spark to a smoldering fire." *Kilgrow v. Kilgrow*, 268 Ala. 475, 107 So. 2d 885, 889 (1958). See *People ex rel Sisson v. Sisson*, 271 N.Y. 285, 2 N.E.2d 660 (1936) *rev'g*. 246 App. Div. 151, 285 N.Y.S. 41 (1936) (lower court had interfered with parent's unfettered rights to impart his religious beliefs to his child). It is absurd to argue, as the Appellees and the District Court, in effect, do, that failing to inform parents under such circumstances is in the family unit's best interests. The rights and potential consequences involved are too important, and the record too weak, to support such facile arguments.

2. The Judiciary May Not Mandate a Policy Which Raises Questions Directly, or by Negative Implication, Concerning the Content and Validity of Parental Religious or Moral Beliefs and Teachings.

In order to maintain their hold on certain minors involved with the clinics they operate, the Provider-Appellees deem it absolutely essential to exclude parental input. When faced with a free exercise claim that exclusion is violative of parental rights, and when the effect of the exclusionary judicial mandate is to mold the perception, attitudes, and activities of the minor children who consult abortion providers "it must appear either that the state does not deny the free exercise of religious belief

by its requirement, or that there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause." *Wisconsin v. Yoder, supra*, 406 U.S. at 214.

If counseling prior to the decision regarding the pregnancy is to be at all worthwhile, it must discuss the attitudes of the minor toward abortion, contraception, and, if she does not want her parents to know of her pregnancy, her relationships with her parents. The District Court's opinion frankly recognizes this fact. One would have to be extremely naive to assume that the topic of parental opposition to abortion or premarital sex does not arise in such conversations. It is uncontroverted that the minors, counselors at the clinics, and the judges of the juvenile court would have to discuss the moral scruples of the parents and the family as well as the morality of the life style involved with teenage sexuality, in order to determine whether, under the District Court's order, parental "bypass" is necessary or advisable.

Counselors or judges must have a source from which they derive the answers to many of the dilemmas which arise in such sessions. It readily can be foreseen that discussions of this type demand that the participants analyze the attitudes of the parents. For purposes of illustration, it can be assumed that a minor might feel that her parents' opposition to abortion is based upon the notion that premarital sex is "wrong or sinful". Similarly, it may be assumed for purposes of illustration that an adolescent continually demands reasons for beliefs and activities.

Thus, even in a counseling session, the attitudes and beliefs of the *parents* and family come under strong scrutiny, by the minor, by the group (if group counseling is employed) and by the allegedly "non-judgmental" counselor. The situation is exacerbated when the purportedly "non-judgmental" counselor feels that abortion is a "liberating influence" for a pregnant minor, enabling her to continue her education or future plans without change. The District Court has mandated a policy which effectively insulates the abortion providers' "counseling" sessions in which the opinions, attitudes, morals, and ethical viewpoints of the parents are brought under scrutiny and has, in its view, created a "non-judgmental" and "supportive" atmosphere in which the minor's problems can be resolved. This expression of the Court's attitude strongly demonstrates the inappropriateness of the situation and the unconstitutional nature of the judicial exclusion of parents from the process. Thus, the threshold question is essentially whether the state may, in any fashion, seek to "analyze" or resolve intra-family disputes over matters of education or elective medical treatment having religious or moral components.

It has long been well-settled that the state is forbidden to intrude in the domain of doctrinal disputes over moral or religious matters. In *Watson v. Jones*, 80 U.S. (13 Wall) 679(1872) the Court noted:

In this country the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the

laws of morality and property, and which does not infringe personal rights, is conceded to all. The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect. . . All who unite themselves to such a body [the general church] do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them [sic] reversed. It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for. 80 U.S. (13 Wall) at 728-729.

Since the Appellee's unsupported fear that the minors may not buy their services, but will instead seek illegal abortions, if the parents are informed rests upon a recognition that the parents may be opposed to abortion or a child's choice of clinic, the District Court's order is merely an attempt to avoid or settle an intra-family doctrinal dispute over matters of health, religion, or morality by "protecting" the minor from his or her own parents. This attitude was condemned in *Yoder*, see 406 U.S. at 232, and suffers from the same defect as the New York statute which sought to recognize the autonomy of North American Orthodox Churches from the Moscow-based general church struck down in *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, (1952):

By fiat it displaces one church administrator with another. It passes the control of matters strictly ecclesiastical from one church authority to another. It thus intrudes for the

benefit of one segment of a church the power of the state into the forbidden area of religious freedom contrary to the principles of the First Amendment. *Kedroff, supra*, 344 U.S. at 119.

In the context of family matters touching religious and moral teachings, the rationale of such cases is even more compelling. Thus, a court is forbidden even to be a "non-judgmental" arbitrator in matters between parents and their children where no neglect is shown; for to conclude, as the District Court has done on the basis of "well recognized" reasons that the parents' views are detrimental to its program is the essence of "judgment". In *Moore v. East Cleveland*, 431 U.S. 494 (1977), this Court stated:

Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural. 431 U.S. at 503-04. (footnotes omitted).

Given this frank recognition of the inherent sanctity of the family, neither the Appellees nor the District Court have a compelling reason—and indeed it is impossible to conceive of one—why the abortion clinics or state supported counselors have any interest whatsoever in counseling pregnant minors regarding matters of religion and morality concerning which parents may desire to consult with and educate their children.

The opinion [in *Watson v. Jones*] radiates . . . a spirit of freedom for religious organizations, an independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine. *Kedroff v. St. Nicholas Cathedral, supra*, 344 U.S. at 116.

Since neither the state nor federal government can prefer and teach any particular point of view regarding matters of religious teaching, *Epperson v. Arkansas*, 393 U.S. 97, 103-104 (1968), and since they are not empowered to resolve controversies between conflicting religious or moral doctrines, *see e.g., Fowler v. Rhode Island*, 345 U.S. 67, 69-70 (1953); *cf., Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 452 (1969) ("Thus, a civil court may no more review a church decision applying a state departure—from doctrine standard than it may apply that standard itself") they should similarly be enjoined from creating a policy where opinion, preferences, or views contrary to those of parents are expressed and "supported" in an inherently unfair setting in which there is no chance for rebuttal. The Ohio Supreme Court wisely noted that when the state attempts to be an "impartial arbiter" its position is fraught with danger:

The state can have no religious opinions; and if it undertakes to enforce the teaching of such opinions, they must be the opinions of some natural person, or class of persons. If it embarks in this business, whose opinion shall it adopt? If it adopts the opinions of more than one man, or more than one class of men, to what extent may it group together conflicting opinions? [O]r may it group together the opinions of all? And where this conflict exists, how

thorough will the teaching be? Will it be exhaustive and exact as it is in elementary literature and the sciences usually taught to children? [A]nd, if not, which of the doctrines or truths claimed by each will be blurred over and which taught in preference to those in conflict? *State v. Whisner*, 47 Ohio St. 2d 181, 207-08; 351 N.E. 2d 750 (1976) *quoting Board of Education v. Minor*, 23 Ohio St. 211, 249-51 (1872).

Had the framers of the Constitution foreseen government involvement in the affairs of the family, they clearly would have framed provisions akin to the First Amendment's protection of speech and religion because "the government is likely to corrupt the family whenever it attempts to improve it because it has no legitimate authority to set moral goals for individuals." Caplow, *The Loco Parent: Federal Policy and Family Life*, 1976 B.Y.U. L. Rev. 709, 713. *Accord, Doe v. Irwin*, 428 F. Supp. 1198 (W.D. Mich. 1977), *vacated and remanded*, 559 F.2d 1219 (6th Cir. 1977), *aff'd on remand*, 441 F. Supp. 1247 (W.D. Mich. 1977).

In *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) Mr. Justice White, concurring in the majority holding, stated:

We have learned, and continue to learn, from what we view as the unhappy experiences of other nations where government has been allowed to meddle in the internal editorial affairs of newspapers. Regardless of how beneficent-sounding the purposes of controlling the press might be, we . . . remain intensely skeptical about those measures that would allow government to insinuate itself into the editorial rooms of this Nation's press. 418 U.S. at 259.

Thus, in all areas covered by the First Amendment protective umbrella, this Court has been unwilling to allow governmental second-guessing or control of those who presumptively must control their own destinies: the press, the church, and the family. There is absolutely no reason for the rule to change here.

B. THE ORDER OF THE DISTRICT COURT APPROVING PARENTAL "BY-PASS" INFRINGES FUNDAMENTAL FAMILIAL RIGHTS.

1. Parental "Bypass" is, in Effect, a Transfer of Custody.

It is only when the integrity of the family unit is broken by divorce, neglect, or abuse that the state or a third-party may seek to terminate parental rights to the custody, care, and nurture of their children. *See, e.g.,* Mass. Gen. Laws Ann. chapter 119 § 24, Ohio Rev. Code chapter 2151. Your *amici* respectfully submit that, given the holding of the District Court and several assumptions which appear to underlie this Court's holding in *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976), the main issues in the case at bar involve familial integrity, temporary child custody, and emancipation of minors. The case does not, as the District Court seemed to suggest, involve state-granted or created rights for parents to "interfere" with their children's wishes or a "veto" such as that involved in *Danforth*, *supra*; rather, it involves young women in need of guidance and the state's attempt to create a structure whereby *all* parties interested in her decision have an opportunity to be heard. The Massachusetts statute recognizes the famil-

ial and emotional realities of the vast majority of pregnant teens; the opinion of the District Court does not:

[A]s a moral structure, the American family is remarkably pluralistic. The family depends for its continuance, either abstractly as an institution or concretely as an individual family, on the maintenance of certain sentiments, obligations, and reciprocities that are neither automatic nor self-generating. The reasons why husband and wife cleave together, why children honor their parents, and why brothers do not take pay from each other are not derived from the state or its secular culture. There are moral sentiments underlying the interactions that constitute the family. Self-interest alone will not account for them, and the legal order cannot enforce them. Caplow, *The Loco Parent: Federal Policy and Family Life*, 1976 B.Y.U. L. Rev. 709, at 712 (emphasis added in part) [hereinafter, Caplow].

Lest there be any misunderstanding of the point raised here, it is simply that the threshold question which not only the Courts below, but the parties themselves seemed to ignore is that, at bottom, the controversy between Appellees, the state, and the parents is over custody of the pregnant minor. The conclusion is inescapable, for it is well settled that a juvenile court does not even reach the question of "best interest" without a prior finding of parental unfitness.

It is a serious matter for the long arm of the state to reach into a home and snatch a child from its mother. It is a power which a government dedicated to freedom for the individual should exercise with extreme care, and only where the evidence clearly establishes its necessity. . .

Under our system of government children are not the property of the state to be reared only where and under such conditions as officials deem best.

* * *

The power of the juvenile court is not to adjudicate what is for the best interests of a child, but to adjudicate whether or not the child is neglected. In *re Rose Child Dependency Case*, 1947, 161 Pa. Super. 204, 208, 54 A.2d 297. In *re Rinker*, 117 A.2d 780 (Pa. Super. 1955). *Accord Petition of Kauch*, 358 Mass. 327, 264 N.E. 2d 371 (1970)

Since this Court's decision in *Planned Parenthood of Central Missouri v. Danforth*, (1977) and, indeed, since *Roe v. Wade*, 410 U.S. 113 (1973) the Court's treatment of pregnant minors and the development of constitutional principles in the area of "minors' rights" generally has lost sight of the basic principle, identified by Mr. Justice Frankfurter, concurring in *May v. Anderson*, 345 U.S. 528 (1953):

Children have a very special place in life which law should reflect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of a State's duty toward children. 345 U.S. at 536

The fact that a particular adolescent is faced with the wrenching problem of an unplanned pregnancy and consults with an abortion clinic or physician who is likely never to see her again to "solve" her dilemma does not automatically negate either the constitutionally protected rights of the parents to consult with and guide their children or the duty of the state to

protect that relationship from interference from outsiders. For this Court to uphold the District Court's decision is to radically alter—without compelling reason—the distribution of parental (i.e. custodial and consultative) power over children, placing it in the hands of physicians, social workers, and the state courts.

It is hard to transact intellectual business in the coin of either the liberators or the child savers. Kid libbers have transmogrified the traditional conceptions of right and liberty. At the core of the civil rights movement and the women's movement has stood the idea that a person's legal autonomy should not be made dependent upon race or sex; it is straightforward and intelligible. By contrast the broad assertion that age is also irrelevant to legal autonomy inescapably collides with biological and economic reality. *Because the young are necessarily dependent for some period after birth, the relevant question is often which should have the power to decide on behalf of the child.* R.H. Mnookin, "Children's Rights: Legal and Ethical Dilemmas," *The Transcript*, Summer 1978 at 53 (emphasis added).²

In the case at bar, parental bypass is the functional equivalent of allowing another adult (the "counsellor", judge, or physician) to act in the place of the parent when serious questions relating to their objectivity, qualifications to guide another's child, and proper role remain unresolved. The counsellor or

² Professor Mnookin's article originally appeared in *The Pharos* of Alpha Omega Alpha, Vol. 41, April, 1978 at 2. He identifies two groups of reformers: "Kiddie libbers" who espouse a "children's liberation" movement patterned after the civil rights movement and women's movements and "child savers" who "see salvation not through liberation but through expansion of a child's legal right to government intervention into the family." Mnookin, *supra* at 5. *Amici* submit that the District's Court order partakes of both theories without offering a coherent theory for either.

physician collects a fee, the amount of which may vary according to the decision made by the minor. Under the District Court's formulation the juvenile judge or case worker, on even more tenuous ground, becomes not only the arbiter but the parent, deciding not only the qualifications of the absent parent and the maturity of the child, but the "best interests" of the minor. In either situation the absence of the only persons who, in the absence of evidence to the contrary, can be presumed to know and care for the child — the parents — is notable. *Amici* submit that it is clearly unnecessary under the facts of this case.

The District Court, eschewing any rational discussion of the limitations on its own power to negate constitutionally protected interests, held that the state is powerless to assure that parents will be consulted on so serious a health matter as abortion on the basis of several "recognized" reasons "why it would be to a minor's best interests for one or both of her parents to be kept in ignorance of her pregnancy." *Baird v. Belloti, supra*, 450 F.Supp. at 1001. Leaving aside, for the present, the question of just how a parent is to determine what interests are parental and which are allocable to the child *per se*, examination of the "recognized" reasons are instructive:

Parents, physically or emotionally unwell, may be injured by the shock, thus causing the minor deep feelings of guilt. Some parents are child abusers; others at least may become actively hostile on such disclosure. Defendants concede, and the evidence shows, that an appreciable number of parents are not supportive. These include not only those who would inflict physical harm, but parents who would insist on an undesired marriage, or a continuance

of the pregnancy as punishment. We may suspect, in addition, that there are parents who would obstruct, and perhaps altogether prevent, the minor's right to go to court. This would seem but a normal reaction of persons who hold strong anti-abortion convictions. *Baird v. Belloti, supra*, 450 F. Supp. at 1001.

Without impugning the good faith of the District Court judges voting to overturn the parental consultation requirement, *amici* submit that the entire approach of the Court below is itself constitutionally deficient in that it engenders exactly the same type of paternalism condemned by this court in *Smith v. Organization of Foster Families, supra*, 431 U.S. at 834. Not only does the District Court's opinion ostensibly permit judicial determination with regard to parental fitness to be based upon hearsay evidence of alleged abusiveness, "unsupportiveness", or harm *to the parents* without affording notice and opportunity for the parents to be heard; but it also ignores the provisions of applicable Massachusetts laws. *See Mass. Gen. Laws* ch. 119 § 24 (allowing a neglect proceeding to be commenced by "*any* person alleging . . . that said child is without necessary and proper physical . . . care.") (emphasis added). Even more bothersome is the gratuitous assumptions that an abortion is in the child's best interests whenever she desires one (regardless of age) and — incredibly — that a court can determine what is in a minor's "best interests" without parental input and a severance of the custodial right.

That the District Court could fail to see the parallel between parental bypass based on hearsay assertions, self-serving state-

ments and questionable presumptions regarding parties not before the court, and the practices condemned in *Alsager v. District Court of Polk County, Iowa*, 406 F. Supp. 10 (S.D. Iowa 1975), *aff'd* 545 F. 2d 1137 (8th Cir. 1976) (per curiam) (on substantive grounds), and the recently decided *New Hampshire v. Robert H.*, 393 A.2d 1387 (N.H. 1978) evidences a lack of reasoned decision-making. In both *Alsager* and *Robert H.* the parents were "bypassed" and their custody terminated on the basis of *one* visit by a social worker; the District Court below allows "bypass" by hearsay and an *ex-parte* order without even *bearing* from the parents.

The potential shortcomings of social work or child care professionals has been recognized by this Court in *Smith v. Organization of Foster Families, supra*, as well as by other courts. See e.g., *New Hampshire v. Robert H., supra*, 393 A.2d at 1389-1391; *In re Rinker, supra*, 117 A.2d at 783-784. But the District Court uncritically accepted the testimony of plaintiffs' "experts", perhaps equally—though unconsciously—biased against parental involvement in the abortion decision for fear parents may harbor anti-abortion sentiments. See *Baird v. Bello-ti*, 450 F. Supp. at 1001.

2. Parental "Bypass", Whether By Legislative Act of Judicial Decree Is Unconstitutional In The Absence of a Compelling State Interest.

As early as 1922 the Utah Supreme Court held that a parent could not be deprived of the custody of his or her child—even

temporarily—without notice and an opportunity to be heard. *Gitsch v. Wright*, 61 Utah 175, 211 P. 705 (1922).

The question goes to the very foundation of judicial proceedings, without which the rights of litigants cannot be judicially determined. That every person has a right to his day in court and an opportunity to be heard before he can be deprived of a justiciable right is too elementary for discussion, much less to invoke the citation of authority.

The right of a party to the custody of a child is just as sacred as the right of property. . . . The plaintiff was entitled to retain. . . custody until deprived thereof by due process of law. By what has been said, there is no intention on the part of the court to in any manner impugn the motives and intentions of the honorable judge, or defendant in the case. It is manifestly clear that he was inspired by humane motives, believing that it was for the best interests of the child to summarily place it in the custody of its mother. But, however good his intentions, the court had no power to make the order, which is challenging in this proceeding. 211 P. at 706.

This Court followed the basic premise of *Gitsch* in *May v. Anderson, supra*, and held that *in personam* jurisdiction over a parent was a jurisdictional prerequisite to severance of the familial bond. The basic premise underlying this solicitude for the rights of parents to nurture, educate, and care for their children is "the importance of the familial relationship, to the individuals and to the society [which] stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in 'promot[ing] a way of life'.

through the instruction of children, *Wisconsin v. Yoder*, 406 U.S. 205, 231-233 (1972), as well as from the fact of blood relationship." *Smith v. Organization of Foster Families*, 431 U.S. 816, 844 (1977). Thus, at a minimum, parents have constitutional rights to:

(1) Physical possession of the child, which, in the case of a custodial parent includes the day-to-day care and companionship of the child.

(2) The right to discipline the child, which includes the right to inculcate the parent's moral and ethical standards.

* * *

(7) The right to prevent an adoption of the child without the parent's consent. *L.A.M. v. Alaska*, 547 P.2d 827, 832-33 n.13 (1976).

Accord, Stanley v. Illinois, 405 U.S. 645 (1971); *Doe v. Irwin*, 428 F. Supp. 1198 (W.D. Mich. 1977), *vacated and remanded*, 559 F.2d 1219 (6th Cir.), *aff'd on remand*, 441 F. Supp. 1247 (W.D. Mich. 1977); *In re Rinker*, 117 A.2d 780 (1955). *But cf., Quilloin v. Walcott*, 434 U.S. 246 (1977) (as to consent for adoption).

In the case at bar, the parental "bypass" mandate of the District Court not only severs the substantive rights of the parents without a hearing on the basis of *ex parte* allegations, it also prevents them from fulfilling their role as parents at a time when their daughters may need them most.

3. The Massachusetts Parental Notification/Consultation Requirements Are Clearly in Keeping with the Express Legislative Policy and Judicial Decisions of the Commonwealth of Massachusetts.

Massachusetts has legislatively declared its policy regarding the protection of children and the preservation of family life:

It is hereby declared to be the policy of this commonwealth to direct its efforts, first, to the strengthening and encouragement of family life for the protection and care of children; to assist and encourage the use by any family of all available resources to this end; and to provide substitute care of children only when the family itself or the resources available to the family are unable to provide the necessary care and protection to insure the rights of any child to sound health and normal physical, mental, spiritual and moral development.

The purpose of this chapter is to insure that the children of the commonwealth are protected against the harmful effects resulting from the absence, inability, inadequacy or destructive behavior of parents or parent substitutes, and to assure good substitute parental care in the event of the absence, temporary or permanent inability or unfitness of parents to provide care and protection for their children. Mass. Gen. Laws Ann. ch. 119 § 1 (West)

The Supreme Judicial Court of Massachusetts has likewise recognized and asserted the Commonwealth's proper role:

While the State defers to the parents with respect to most most decisions on family matters, it has an interest in insuring the existence of harmonious relations between family members, and between the family unit and the rest of of the public society. To protect this interest, the State may properly require that unemancipated children obey the reasonable and lawful commands of their parents, and

it may impose criminal penalties on the children if they persistently disobey such commands. The State is not powerless to prevent or control situations which threaten the proper functioning of a family unit as an important segment of the total society. It may properly extend the protection of its laws in aid of the head of a family unit whose reasonable and lawful commands are being disobeyed by children who are bound to obey them. The making of such laws is within the power of the Legislature "to make, ordain, and establish, all manner of wholesome and reasonable Orders, laws, statutes, and ordinances, directions and instructions, either with penalties or without; *** as *** [it] shall judge to be for the good and welfare of this Commonwealth, and for the government and ordering thereof, and of the subjects of the same." Part II, c.1 § 1, art. 4, of the Constitution of Massachusetts. *Commonwealth v. Brasher*, 359 Mass. 550, 270 N.E. 2d. 389, 394, (1971).

The State's continuing concern for the "private realm" of the family, its strength, and integrity could hardly be manifested more clearly. The law-makers and the courts are understandably wary of any intrusion or threat to the stability of the family on the part of the state, its agents, and third parties.

As in other jurisdictions, interference is permitted *only* if the welfare and protection of the child are seriously threatened and strict safeguards have been created to assure that the rights and well-being of parents and children are preserved as much as possible. Thus, any person may petition the appropriate court for a custody determination, but first there must be a showing

... that said child is without necessary and proper physical educational or moral care and discipline, or is growing up under conditions or circumstances damaging to a child's sound character development, or who lacks proper atten-

tion of parent, guardian with care and custody, or custodian, and whose parents or guardian are unwilling, incompetent or unavailable to provide such care, . . . Mass. Gen. Laws Ann. ch. 119, § 24. (West)

In the face of a proven charge of neglect, the rule is clear:

Parents' rights must yield to the best interests and welfare of their children. Although parents are the natural guardians of their minor children, their obligation to their children is in the nature of a trust reposed in them subject to their correlative duty of care and protection. The parents' right to associate with their children may be terminated *by their failure to discharge those obligations*. *Donnelly v. Donnelly*, — Mass. App. Ct. —, 344 N.E. 2d 195, 197 (1976) (emphasis added).

It is equally clear, however, that the presumption of the Commonwealth is that parents are entitled to the custody and care of their children, "unless the Probate Court finds the parents 'unfit to have such custody.' The burden of proving unfitness is upon those challenging the parents." *Petition of Kauch*, 358 Mass. 327, 264 N.E. 2d 371, 373 (1970).

The Commonwealth's judicial authorities have wisely recognized that it is impossible for any inflexible standard to govern the "intricacies and subtleties of the parent-child relationship" *Guardianship of a Minor*, 1 Mass. App. Ct. 392, 298 N.E. 2d 890, 893 (1973). Yet general criteria have been formulated to determine whether parents are "unfit":

In general, the word means unsuitable, incompetent, or not adapted for a particular use or service. As applied to the relation of rational parents to their child, the word usually although not necessarily imports something of

moral delinquency. Violence of temper, indifference or vacillation of feeling toward the child, or inability or indisposition to control unparental traits of characters or conduct, might constitute unfitness. So, also, incapacity to appreciate and perform the obligations resting upon parents might render them unfit, apart from the other moral defects . . . *The unfitness of parents in this section of the statute must be determined with respect both to their own character, temperament, capacity, and conduct, and to the welfare of the child in connection with its age, environment and affections. Richards v. Forrest*, 278 Mass. 547, 180 N.E. 508, 510-11 (1932) (emphasis added).

Thus, in any challenge to parental control, the best interests of the child must be carefully considered. As the Honorable Thomas D. Gill, a judge of the Juvenile Court for the State of Connecticut, noted:

The neglect statutes are concerned with parental behavior not as behavior per se, but only and solely as it adversely affects the child in those areas of the child's life about which the statutes have expressed concern. Each child embodies his own unique combination of physical, psychological, and social components; no child has quite the same strengths or weaknesses as another or exactly the same relationship with his family. The parental failure which markedly damages one child might leave another quite untouched. This interaction between the child and his family is the essence of a neglect situation, the imponderable which defies statutory constraint. *Guardianship of a Minor* 1 Mass. App. Ct. 392, 298 N.E. 2d 890, 893 (1973) (citation omitted).

In the absence of evidence to the contrary, a parent is presumptively knowledgeable regarding the vast majority of the relevant factors noted above as they relate to his or her child,

and should be presumed to act in the best interests of that child. The mere fact that a parent would object to his or her child's activities, or would disagree with the child's unilateral decision to have an abortion does not automatically prove that the parent does not have the child's best interests at heart. This is the basis for the Massachusetts statutory requirements. Abortion is not always in the minor's best interests. Certainly, therefore, parents have both the right to know of the proposed abortion and the responsibility to assist their child in making such a decision. The Supreme Judicial Court's construction of the statute is an attempt to accommodate both the minors' right to seek an abortion and the rights of the parents to the care, custody, and control of their children.

The Legislature and judiciary of the state have chosen to reject the notion that the abortifacient rights of *Roe v. Wade*, 410 U.S. 113 (1973) are absolute and exclusive. The theory that parental rights must *always* give way to the rights of their minor children has properly been dismissed as contrary to established public policy and the general well-being of the Massachusetts Commonwealth and the citizenry and it is not for the Federal Courts, under the guise of constitutional decision-making, to work so fundamental a change in the social order.

The state's course of accommodation wisely acknowledges that the rights and interests of parents and children are entwined and not easily severable. Thus, for good cause, the minor may seek a consent order from a judge if one or both of the minor's parents refuse to give consent for the abortion. This

provision of the Massachusetts statute is consistent with express legislative policy and controlling state court decisions, for the judge will then weigh the parents' decision within permissible limits and the best interests of the minor.

II. THE STATE MAY NOT FAVOR THE ALLEGED "PRIVACY" INTERESTS OF MINORS, IF ANY, TO THE EXCLUSION OF PARENTAL RIGHTS TO THE CARE, CUSTODY, AND NURTURE OF THEIR CHILDREN.

A. The Alleged Rights of Minors Cannot be Invoked As A Talisman by the State to Avoid Addressing the Interests At Stake In the Case At Bar.

It has now been settled conclusively that notwithstanding a right of access to non-prescriptive contraceptives free of state interference, see e.g., *Carey v. Population Services International*, 431 U.S. 678 (1977); *T.H. v. Jones*, 425 F. Supp. 873 (D. Utah 1975) (three judge court), *aff'd in part by order*, 425 U.S. 986 (1976), the right of access to constitutionally protected activity does not alone carry with it a claim on the public purse to fund the distribution of such services. *Maher v. Roe* 432 U.S. 464 (1977); *Poelker v. Doe*, 432 U.S. 519 (1977).

Although the right to tap the public purse is not at issue in the case at bar, it is important to recognize that although rights may be considered by the Supreme Court to be "fundamental", such a circumstance does not automatically bend all the normal rules which govern constitutional adjudication in cases where they are alleged to be at stake. In both *Maher* and *Poelker*, *supra*, this Court clearly recognized that a desire to have the ex-

ercise of one's constitutional rights funded at public expense raises serious constitutional concerns:

[W]hen a State decides to alleviate some of the hardships of poverty by providing medical care, the manner in which it dispenses benefits is subject to constitutional limitations. *Maher v. Roe*, 432 U.S. at 469-470.

* * *

The decision whether to expend state funds . . . is fraught with judgments of policy and value over which opinions are sharply divided. Our conclusion that the Connecticut regulation is constitutional is not based on a weighing of its wisdom or social desirability, for this Court does not strike down state laws "because they may be unwise, improvident, or out of harmony with a particular school of thought." *Williamson v. Lee Optical Co.*, 438 U.S. 483, 488 (1955) (citation omitted). *Maher v. Roe*, *supra* at 479.

The importance of the foregoing language as a guide lies in its emphasis on the constitutional limitations on state action and judicial conduct. The fact the legal abortion is available to minors does not automatically negate the State's constitutional obligations to parents nor does it supercede the limitations imposed by the Constitution upon interference in internal familial relationships, especially those having moral or religious components.

Similarly, the allegation that there exists a right to "privacy" which may comprehend access to abortion by minors is not a talisman which can be invoked by the courts to negate the fundamental interests of parents. The same tactic was attempt-

ed, and rejected, in *Maber* and *Poelker*, and the attempt to utilize a similar analysis in the District Court's opinion should be recognized for what it is and, accordingly, rejected.

The fact that a court may feel that there is a "need" for its decision and subsequent abortion services to be rendered in secret is determinative of neither the question of whether or not it may foreclose parental involvement, nor the entirely separate issue of whether or not the minor has any constitutional right to demand that the state exclude her parents from the decision-making process. A thorough analysis of both questions demonstrates that they are without merit.

[T]here is a distinction between the *needs* of some minors for family planning materials and the *rights* of some minors to those materials. The . . . emphasis on preventing physical harms addresses the needs of some minors so endangered. However, the right, if any, of minors to those materials is based on capacity, of which need is not a function. Thus, the . . . reference to sexually active minors as those whose interest cannot be infringed is a legislative conclusion, since it responds to needs, rather than a judicial one, which would respond only to the rights involved. The right of privacy claimed here does not give occasion to consider the needs of minors in its calculation. *T-H- v. Jones*, 425 F. Supp. 873, 887-888, n.6 (D. Utah 1975) (3 judge court, emphasis by the Court.) (Anderson, J. dissenting).

Thus, this Court should be aware of the fact that the purported "need" which the District Court sought to establish is not *the need to reduce illegal abortions*, see *Baird v. Bellotti*, 450 F. Supp. 997, 1003 (D. Mass. 1978), or the alleged need of

minors to broad access to abortion and "supportive" counseling; rather, it is the purported "need" of the minor to avoid parental input in the quaternary relationship of physician-counselor-state-patient.³

B. THE RECORD IS DEVOID OF EVIDENCE THAT PARENTAL AND STATE INTERESTS ARE IN CONFLICT WITH EITHER THOSE OF MINOR CHILDREN OR THE APPELLEES REGARDING PROBLEMS CREATED BY OUT-OF-WEDLOCK PREGNANCY.

1. The Decision of the District Court Lacks Evidentiary Support.

Since a pregnant minor has no constitutional right to demand that the state provide free abortions, *Maber v. Roe, supra, Poelker v. Doe, supra*, she has no right to demand that the state prefer whatever interests she might raise in support of secrecy over the interests of her parents to the care, custody, and nurture of their child. In addition to the grave constitutional questions which arise when the State interferes in familial disputes, it is submitted that a minor has no judicially enforceable claim, federal or otherwise, to be free of the advice and consultation of her parents. See discussion *infra* Part III. A.

³ The District Court failed to appreciate the complexity of the relationships at stake here. The physician has only a tangential relationship to most abortion patients, seeing them only when problems arise or when the abortion is about to be performed. The Appellees have never demonstrated the need for minor to avoid consultation with their parents. It has only been able to allege that such contact might face the minor with an unpleasant situation—parental opposition to their desire to abort. This is not a proper governmental concern unless it constitutes medical neglect detrimental to the child's well-being. See Part I. B. *supra*.

The Appellees have attempted to establish a system which, by judicial fiat, excludes parents from the minors' decision-making, but have demonstrated no compelling reason for so doing. Thus, the attempt is nothing more than a well-intentioned attempt to remake the family and the minor's moral and religious training in the image of those who see abortion as a panacea for the pregnant teenager. The Appellees, for reasons of their own, (which do not appear in the record), do not wish to include parents in the physician-state-counselor-minor relationship which the District Court has established in the hope of "saving" a minor from "unsupportive" or "anti-abortion" parental views.

[A]t present, all three branches are busy recreating the American family in no particular image. Their efforts are complex to begin with and become more complex as they prove faulty and are repeatedly repaired and patched. At the heart of the government's inability to improve family arrangements is a fundamental lack of understanding of the nature of the family structure. Caplow, *supra*, at 711.

The fundamental truth of Professor's Caplow's observation is underscored by the District Court's cavalier attitude towards parents and its outlook and response to the problem of premarital sex and abortion. Incredibly, and without support from the record, the Court equates some parents' opposition to abortion as a total lack of concern about the problem of out-of-wedlock pregnancy. The Court concludes, without foundation, that parental consultation "will lead her to the

illegal abortionists that defendants rightly decry or to other dangerous activity." 450 F.Supp. at 1003.

Given that the record contains no evidence that the Massachusetts statute will not function properly and drive minors to illegal abortionists⁴, the animus the Appellees exhibit toward the arguments made by the intervenor and the State must rest upon something *other than* a proven detrimental effect of parental consultation and consent on a yet-to-be-proven-harmful program. It is submitted that Appellees' opposition rests on a fear (born of financial interest and, in some cases, intolerance) of the parents' legal, philosophical, religious, or health-related objections to the counseling conducted at the clinics or under the auspices of a juvenile court.

A thorough examination of the record will not point to any evidence whatsoever which would support an allegation that parents do not have the best interest of their minor children in mind. In fact, the only evidence about the allegedly detrimental effect of parental involvement is opinion testimony by the plaintiffs' experts that "doubted the efficacy of last minute,

⁴ The allegation that the statute will result in illegal abortions proves nothing. There is no evidence in the record proving the point other than speculation. In fact, there exists a substantial question regarding the definition of "illegal abortion" in this case. As long as the minor could find a doctor willing to ignore the Massachusetts statute, the abortion would otherwise be perfectly legal. The recent exposé of allegedly "safe" legal abortion clinics in Chicago presents the pregnant teen with a "Hobson's choice." See *The Abortion Profiteers*, Chicago Sun-Times, Nov. 12-Dec. 3, 1978 (special reprint). The concern of the state and of the federal courts is *only* that the pregnant minor get the medical services she needs; they have no valid concern with the type of treatment chosen unless it can be shown that her health will be endangered and that the choice constitutes neglect.

state-compelled consultation." 450 F. Supp. 1003.

What the Appellees and the District Court failed to acknowledge, however, is that even families with "healthy" parent-child communications may face an unplanned pregnancy, and in situations where communications regarding premarital sex have not taken place prior to the pregnancy, the parents may be totally unaware of or only dimly suspect, their child's sexual activity. In either situation the District Court's conclusion is highly condescending, for it fails to recognize that parents have a *right* to consult. It is not for the courts, or paid social workers, to judge the worth of a parent's input.

The difficulty becomes even more acute in cases where the minor's fear is that her parents will discern — from her pregnancy — that she is sexually active. Parental antagonism toward such activity, or their initial upset and frustration over what they may understandably perceive as a "failure" of their guidance, may *not* be equated with a showing of neglect or a default of parental duty. Likewise, neither the reaction of the parents toward the "counseling" the child receives at an abortion clinic, nor their antagonism toward abortion in general, is evidence of a lack of parental concern or support.⁵ The difference may be over the *method* of how to deal with the pregnancy, not the reality. The comments of the New York Court of Appeals are instructive:

The court cannot regulate by its processes the internal affairs of the home. Dispute between the parents when it

does not involve anything immoral or harmful to the welfare of the child is beyond the reach of the law. The vast majority of matters concerning the unbringing of children must be left to the conscience, patience and self-restraint of the father and mother. No end of difficulties would arise should judges try to tell parents how to bring up their children. Only when moral, mental and physical conditions are so bad as to seriously effect the health

⁵ In the context of the case at bar, the notion of parental "supportiveness" seems to be equated with approving the decision to abort. While it may be conceded that some parents would demand that their daughter abort, it is doubtful that a court would force her to over her objections. The Appellees' concern, however, is where the parents *disapprove* of abortion and attempt to persuade their daughter to carry the pregnancy to term. This is in Appellee's view, failing to be "supportive of a decision" reached in consultation with individuals, paid by the clinic, who are, essentially, parent-surrogates. The anomalous result is that parents are expected to be "supportive" of a decision in which they played no part, and of which they disapprove on pain of being excluded entirely from even knowing of the procedure. The danger of such inverted reasoning becomes even greater when some clinics pay their "counselors" to sell abortions and feel they must "corral" their patients. *The Abortion Profiteers*, Chicago Sun-Times, Nov. 12-Dec. 3 (1978) (special reprint) at 3-4, 21, 33.

The reasons why a parent may disapprove of abortion and the reasons why a parent may counsel their daughter to avoid one may not be questioned or disapproved by either the state or federal courts:

[A]t this date and time in the history of our nation it is crystal clear that neither the validity of what a person believes nor the reasons for so believing may be contested by an arm of the government [citation omitted] . . . The applicable test was enunciated in *United States v. Seeger* (1965) 380 U.S. 163, 185, in these words: ". . . that while the 'truth' of a belief is not open to question, there remains the significant question, whether it is 'truly held,'" *State v. Whisner*, 47 Ohio St. 2d 181, 199, 351 N.E. 2d 750 (1976).

The District Court's conclusion that the parents' views were of doubtful efficacy to a pregnant teen is exactly the sort of unconstitutional interference condemned in *Wisconsin v. Yoder*, *supra*, and *Whisner*.

or morals of children, should the Courts be called on to act. *People ex rel Sisson v. Sisson*, 271 N.Y. 285, 2 N.E. 2d 660, 661 (1936).

2. The District Court's Opinion is Inconsistent With Generally Accepted Concepts for the Protection of Immature Minors.

Historically, government has been extremely careful to avoid usurpation of parental authority and to encourage family values. Clearly, it is this desire to foster family values and to recognize parental authority which prompts states to enact statutes which set the minimum age for many potential activities of minors.⁶

Any move by the judiciary which would erode the basic core group known as the family and serve to lessen the parental influence would thus be completely at odds with what has been viewed best by the Congress, state legislature, and by American society as a whole. This view was echoed by the Michigan Court of Appeals in *Paige v. Bing Construction Co.*, 61 Mich. App. 480, 233, N.W. 2d 46 (1975):

⁶ *E.g.*, Mass. Gen. Laws chapter 207, §7 (marriage); Mass. Gen. Laws chapter 273 §1 (which sets criminal penalties for desertion and non-support); Mich. Comp. Laws Ann. 750.136 (which sets criminal penalties for child abuse); Mich. Comp. Laws Ann. 750.137 (which prohibit second-hand dealers from purchasing goods from minors under 18 years of age without the written consent of the parent); Mass. Gen. Laws chapter 138 §34 (which forbids the sale or delivery of alcoholic beverages to minors under 18); Mass. Gen. Laws chapter 231 §85P (which establishes that persons who reach the age of 18 have the full legal capacity to contract); Mass. Gen. Laws chapter 272 §29A, (which imposes criminal penalties for the dissemination of visual materials which depict a child under 18 in a state of nudity or participating in acts of sexual conduct.)

Parents have a social and moral obligation to provide maintenance and guidance for their children, and the state benefits from their meeting this obligation. The law does step into this private relationship where the child's well-being is seriously affected. Each parent has unique and inimitable methods and attitudes on how children should be supervised. Likewise, each child requires individualized guidance depending on intuitive concerns which only a parent can understand. Also, different cultural, educational and financial conditions affect the manner in which different parents supervise their children. Allowing a cause of action for negligent supervision would enable others, ignorant of any standards, to second-guess a parent's management of family affairs considerably beyond these statutory protections.

Despite the rapidly changing nature of our society in these the most turbulent of times, there is a continuing need for parental discipline and control over children within the sphere of the family. We conclude that to take a step which could unduly disturb and further erode the harmony of the family is unwarranted considering the practical impossibility of logically distinguishing between "authority" and "supervision" on a case-by-case basis. 61 Mich. App. at 485-486.

Thus, absent a clear case of neglect or abuse, parents must be presumed to have their child's best interest as their foremost goal.

In this case, there is no compelling reason for judicial interference with parental rights and duties to control, protect, support, guide, and educate their children. The parent-surrogates who counsel minors at the abortion clinics should not be free to second-guess parents, re-educate their children, and hide their activities behind a veil of secrecy. Professor Hafen has written:

The activity of raising a family is heavily value-laden. The existence of a broad discretion in parents to express strongly felt preferences and values in context of the family unit is consistent with our society's commitment not only to tolerating and protecting, but also to encouraging ideological diversity and freedom. It is especially fitting to respect that freedom in the case of the rights of parents since reasonable men and women differ, often to great extremes, on the question of what constitutes optimal child-rearing practices. This does not ignore the fact that a great many parents are inept, ill-informed, and in some ways unreasonable and incompetent. Not surprisingly, children of such parents, not to mention juvenile court personnel and social workers, are not enthusiastic about these poor qualities. But it is also true that children (and their advocates) are often vehemently unenthusiastic about the qualities of quite competent parents. That being the case, it would be improper to judge the merits of parental conduct by a standard that would reflect the particular values of the court or a segment of the community, rather than by standards of neglect and abuse (Citation omitted). B. Hafen, *Status Offenses and Children's Rights: Do Children Have a Legal Right to be Incurable*, 1976 B.Y.U. L. Rev. 659 at 679. (hereinafter referred to as Hafen).

Professor Hafen also states that it is often in the best interest of the child to leave parental discretion free of outside interference in order to give the child a feeling of security and continuity and that it may well be a child's "right" to be subject to parental discipline.

It is inherent in the concept of discipline that the one subject to it does not regard it as being in his or her interest. For that reason, an acceptance of the idea of discipline is practically synonymous with some degree of authoritarianism. Unless one rejects the idea that being subject to some restrictions and discipline can be a healthy part of a child's

upbringing, some concession in favor of parental authority is inescapable. State intervention that tends to weaken parental discipline or encourage its disregard by a child would thus not necessarily be a service to the child, even if welcomed by the child at the time it occurred. *Hafen, supra* at 680-681.

In expanding these two arguments, it is necessary to keep in mind that children today are being propelled into situations which were almost unheard of just a decade ago. A minor is faced with the daily realities of sex, drugs, intense peer pressure, crime, media "blitzes", etc. The list is endless—and staggering. Children are simply not prepared—intellectually, emotionally, and physically—to cope with such an onslaught. They need parental guidance, especially when faced with the immense and important decision of how to deal with an unplanned pregnancy.

Who is better able than parents to provide a haven of some solidarity to a child confronted by such influences? And who is better aware of an *individual* child's limited judgment, experience, and capacity to encounter and deal with the pressure of life than the child's parents?

The Appellees seem to argue that children are capable of making decisions which will mold and fundamentally influence the future course of their lives without the necessity of consultation with their parents. Possibly, an *exceptional* 16, 17, or 18-year old could make such important decisions, but their ability to do so on a consistent basis is doubtful. When 9, 10, and 11-year olds are being encouraged to "decide" based on the same variables that face an adult, the Appellees' position approaches

absurdity. Can it honestly be argued that these children should be left to the counsel of a state-supported or financially interested surrogate when the parent is available? Certainly minors—from 9 to 18—would be hard-pressed to assume all the consequences of their autonomous decision-making, even assuming a developing competence to consider the variables involved. Can the Appellees assert that parental exclusion is really in the best interest of the child?

It has nevertheless been argued that concerns about state intervention into family life should apply not only to direct acts by state agents, but also to the use of state resources as supports for parental intervention seems to derive from a philosophical position that opposes not only governmental action but also any authoritarian interference with the lives of children. Ironically, limiting parental authority on behalf of children, perhaps in the form of more far-reaching recognitions of children's rights in contexts where their actual needs for protection are not at stake. It is not possible for the state to remain truly neutral, particularly when parents begin with a position of authority over their children within the inherent status quo. Denying a portion of parental authority necessarily adds to the authority of children. Such an addition may be appropriate when the circumstances make it clear *in an individual case* that children have some special need. But, as long as the limited capacities of children make it either impossible, unrealistic, or unfair to them to let them assume full responsibility for their own lives, ultimate control over their conduct must and will necessarily rest either with their parents or with the state. Thus, reducing parental authority simply creates an increased state involvement. That, it is submitted, would be the worse of two potential evils. B. Hafen, *Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth To Their "Rights"*, 1976 B.Y.U. L. Rev. 605, 654-655. (emphasis added).

Accord, R.H. Mnookin, "Children's Rights: Legal and Ethical Dilemmas," *The Transcript*, Summer 1978 at 5.

The record does not demonstrate a "compelling" necessity for the confidential relationship for which Appellees sought the approval of the federal courts, and the District Court's opinion cites none which would authorize a state judge to exclude parents by *ex parte* order. Given the lack of evidence to support anything but speculation as to parental action or reaction and the heavy burden of proof imposed upon those who seek to have the First and Fourteenth Amendment consideration implicit in this action set aside, the judgment of the District Court itself is an unconstitutional infringement of familial and parental rights insofar as it purports to authorize *ex parte* (judicial action in non-emergency situations with regard to either "bypass" or a finding of maturity; an abuse of judicial power insofar as it purports to substitute its views for those of the Massachusetts legislature; and an erroneous statement of the law insofar as it purports to hold that *Roe v. Wade*, 410 U.S. 113 (1973) changes well-settled law recognizing parental interests and makes the child's "best interests" (defined as an abortion) superior to the rights of the parents in all cases.

III. ABORTIONAL RIGHTS ARE NOT UNCONSTITUTIONALLY BURDENED BY THE MASSACHUSETTS ACT WHICH REQUIRES PARENTAL NOTIFICATION AND CONSULTATION PRIOR TO THE PERFORMANCE OF ABORTION SURGERY ON CERTAIN PREGNANT MINORS.

A. Neither *Roe v. Wade* Nor *Planned Parenthood v. Danforth* Confers Upon All Pregnant Minors the Unqualified Right to Have an Abortion.

In *Roe v. Wade*, 410 U.S. 113, 153-55 (1973), this Court held that the right of personal privacy included the right of women to freely choose to have an abortion during the first two trimesters of pregnancy. Therefore, the court held unconstitutional a Texas statute which prohibited *all abortions* except those procured for the purpose of saving the life of the mother. *Id.* at 164. Since the *Roe* decision did not involve the important and complex issues raised by state attempts to regulate abortion surgery on pregnant minors, the limited principles announced in that case were not intended to resolve issues such as those raised in the instant appeal.

It should be noted, however, that this Court made it clear in *Roe*, its first major abortion decision, that the fundamental right it announced did not confer upon all pregnant women a right to unilaterally dictate when, where, and under what circumstances an abortion would be performed. For example, the Court distinguished between first trimester abortions and post-viability abortions, holding that the state had greater and more compelling interests in regulating the latter category of abortions.

Indeed, this Court expressly held that the states could require that all abortions, including first trimester abortions, be performed by licensed physicians. *Roe v. Wade* 410 U.S. 113, 165 (1973). Moreover, the Court recognized that important state interests respecting *adult* abortion surgery may be protected as long as unconstitutional interference with the patient/physician decision to terminate a pregnancy does not result. *Id.* at 149-50.

In the more recent decision of *Maher v. Roe*, 432 U.S. 464 (1977), this Court has warned that *Roe* is not to be interpreted as conferring an unqualified right to an abortion:⁷

⁷ Since *Roe v. Wade*, this Court has upheld a number of abortion restrictions even though they regulated *adult* abortion patients. *See, e.g., Doe v. Bolton*, 410 U.S. 179 (1973) (statute requiring that all abortions be performed by licensed physicians, who must first determine through the use of their "best clinical judgment that an abortion is necessary" held constitutional); *Connecticut v. Menillo*, 423 U.S. 9, 10-11, (1975) (*per curiam* opinion holding that state may constitutionally require that abortions be performed only by medically competent personnel under conditions insuring maximum safety for the woman); and *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 60-67 (1976) (state may constitutionally require written, informed consent from the mother prior to initiation of surgical procedures).

⁸ It is the position of your *amici* that the portion of the *Danforth* decision concerning parental consent is unsupported by sound constitutional principles and public policy. Many states have long-standing parental consent requirements. *See* discussion *supra* at Part I. B. (3). Preeminent among these are parental consent requirements for minor marriages. Obviously, there are compelling, as well as rational, reasons for such requirements even though they impact on the First Amendment associational rights of minors. Certainly, these associational rights are no less important in our constitutional scheme than a minor's right to an abortion. Nevertheless, since *amici* believe that *Danforth* supports the instant statute, rather than renders it unconstitutional, it is unnecessary for this Court to reverse its decision in *Danforth* in order to uphold the challenged statute herein.

The right in *Roe v. Wade* can be understood only by considering both the woman's interest and the nature of the State's interference with it. *Roe* did not declare an unqualified constitutional right to an abortion. *Id.* at 478. See also *Bellotti v. Baird (I)*, 428 U.S. 132, 147 (1976):

The first application of this analysis by the Supreme Court to a statute regulating abortion surgery on minor patients was in *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976). In *Danforth*, this Court, by the narrow margin of five-to-four, held that a state could not enact a statute which required a minor to obtain parental consent as an absolute prerequisite for obtaining an abortion.⁸ Justices Blackmun, Brennan, and Marshall, joining in the Court's decision, noted that every minor, regardless of age or maturity, may give effective consent for termination of her pregnancy." *Id.* at 75.

The principal distinguishing feature between the challenged statute in *Danforth* and that of Massachusetts is that the former gave parents an absolute power to veto the abortion decision of the pregnant minor in all instances. Under a narrow construction of the Massachusetts statutes, parents are merely granted a right to be notified of the minor's abortion-related activities and a qualified right to influence her decision respecting the procurement of an abortion. *Baird v. Attorney General*, Mass. Adv. Sh. (1977) 96, 360 N.E. 2d 288, 292, 303 (1977).

This key difference between the two parental rights' statutes was emphasized in the concurring opinion of Justice Stewart, joined by Justice Powell, who indicated that a statute requiring

parental notification/consultation would be constitutionally permissible:

With respect to the state law's requirement of parental consent, § 3(4), we think it clear that its primary constitutional deficiency lies in its imposition of an absolute limitation on the minor's right to obtain an abortion. The Court's opinion today in *Bellotti v. Baird*, 428 U.S. 132, 147-148 suggests that a materially different constitutional issue would be presented under a provision requiring parental consent or consultation in most cases but providing for prompt (i) judicial resolution of any disagreement between the parent and the minor, or (ii) judicial determination that the minor is mature enough to give an informed consent without parental concurrence or that abortion in any event is in the minor's best interest. *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52, 90-91 (1976).

Justice White, Chief Justice Burger, Justice Rehnquist, and Justice Stevens dissented in *Danforth* and indicated that, in their opinion, the more stringent parental consent restrictions contained in the Missouri statute were constitutional. 428 U.S. at 95, 104. When the opinions of the dissenting Justices are combined with the comments by Justice Stewart, it becomes apparent that a majority of this court feels that state parental notification/consultation provisions, such as those challenged in the instant case, are constitutional.

Such a posture is clearly dictated by the Court's auxiliary decision in *Danforth* upholding a requirement that written consent to abortion surgery be given by adult abortion patients:

The decision to abort, indeed, is an important and often stressful one, and it is desirable and imperative that it be made with full knowledge of its nature and consequences. The woman is the one primarily concerned, and her awareness of the decisions and its significance may be assured, constitutionally, by the State to the extent of requiring her written consent. 428 U.S. at 66-67.

The added features of the Massachusetts statute — notification and consultation — merely insure that equivalent informed consent is given by minor patients.⁹

Your *amici* contend that the Massachusetts statute, as interpreted by the Supreme Judicial Court on remand, is constitutional under *Danforth*. The statute does not make parental consent an absolute prerequisite to minor patient abortions; rather it assures that needed consultation and advice will be given to pregnant minors contemplating abortion surgery. Any disagreement between the pregnant minor and her parents will be resolved judicially in an expeditious manner. Moreover, the court may, in any event, grant consent if it feels the abortion is in the minor's best interest. See *Baird v. Attorney General*, 360 N.E. 2d at 293. Therefore, the statute should be upheld as constitutional by this Court.¹⁰

B. The Massachusetts Provisions Regarding Parental Notification/Consultation Are Supported by Both Compelling State Interests in Child Welfare and Rational Legislative Judgment.

The constitutional test of any state law which impacts upon "the freedom of action of young people in sexual matters is whether the restriction rationally serves valid state interests."

Carey v. Population Services International, 431 U.S. 678, 707 (1977) (Powell, J. concurring); *Maher v. Roe*, 432 U.S. 404 (1977). It is manifestly evident that the Massachusetts statute involved in the instant case is rationally linked with legitimate state interests. Assuming, *arguendo*, that the statute impacts on fundamental abortifacient rights of minors in a manner which requires a compelling state justification, it is clear that such justification exists.

Amici have demonstrated the existence of fundamental parental rights to care for, educate, and maintain custody of their children, which the state may protect through appropriate legislation, in Parts I and II of this Argument. They have also demonstrated the need and justification for parental notification/consultation when minor children seek abortion surgery. Moreover, the compelling need for parental notification/con-

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The need for parental consultation is heightened by the documented failure of many abortion clinics to fully inform and advise their patients regarding the desirability and/or consequences of abortion surgery. See Brief of Defendant-Intervenor Jane Hunerwadel at 22, 23, n.16.

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It should be noted that parental notification in no way violates a minor's ostensible right to an "anonymous abortion." The privacy right articulated in *Roe* does not encompass a right to have the abortion anonymously. This Court has sustained, against constitutional attack, state abortion record keeping. Provision of such information to the state may be "unpleasant" in some cases. It might even cause some patients to "avoid or postpone abortion surgery;" and it could reflect adversely on the character of the patient. However, this does not automatically constitute a violation of the privacy rights expressed in *Roe*. *Whalen v. Roe*, 429 U.S. 589, 602 (1977).

sultation when a minor child contemplates having an abortion was clearly and articulately demonstrated at trial. To briefly summarize: (1) there is a need for parental support and guidance respecting the abortion decision (App. II, 44, 47, 51-52, 103, 104, 137, 226, 249); and (2) there is a need for assistance in the selection of a physician and medical facilities (App. II, 70-71, 185-86, 203-204, 207).

These functions are not adequately fulfilled by the state, or potentially self-interested abortion clinic personnel; moreover, these functions are not the primary responsibilities of either of these entities. The "primary role of parents in the upbringing of their children is now established beyond debate . . ." *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972). Given these compelling parental interests, and the fact that the Massachusetts statute does not impermissibly impact on fundamental privacy rights of pregnant minors, this Court should reverse the decision of the lower court and hold the Parental Notification/Consultation Provisions constitutional.

CONCLUSION

It is evident that the Massachusetts Parental Notification and Consultation requirements for minors contemplating an abortion reflect the well-settled and fundamental principle that parents have the primary right and duty to care, educate, and maintain custody of their minor children. Moreover, the notification and consultation requirements do not unduly burden a minor's abortifacient rights. Under the principles announced by five Justices of the Court in *Danforth*, these provisions are clearly constitutional. For all of the above-stated reasons, *amici* request that this Court reverse the order of the District Court below.

Respectfully submitted,

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January 25, 1979

CERTIFICATE OF SERVICE

I, Stuart D. Hubbell, attorney for *Amici Curiae* in this case, being a member of the bar of the Supreme Court of the United States, do hereby certify that I have caused a true and correct copy of the foregoing motion to be served upon Appellants, Appellant/Intervenors, Appellee/Intervenors, and Appellees, they being the parties of record by depositing copies of said brief in a United States Post Office mailbox, with first-class postage prepaid addressed to: Francis X. Bellotti, Office of the Attorney General, the Commonwealth of Massachusetts, John W. McCormack State Office Building, One Ashburton Place, Boston, Massachusetts 02108, and Garrick F. Cole, Office of the Attorney General, the Commonwealth of Massachusetts, John W. McCormack State Office Building, One Ashburton Place, Boston, Massachusetts 02108, attorneys for Appellants; Brian Riley, 40 Court Street, Boston, Massachusetts 02108, attorney for Appellant/Intervenor Jane Hunerwadel; John Henn, Hoag & Eliot, 10 Post Office Square, Boston, Massachusetts 02108, attorney for Appellee/Intervenor Planned Parenthood League of Massachusetts, *et al.*; Joseph Balliro, 1 Center Plaza, Boston, Massachusetts 02108; attorney for Appellees; and Victor G. Rosenbloom, *et al.*, 230 North Michigan Ave., Suite 515, Chicago Illi-

nois 60601, attorneys for *Amici* Americans United For Life, Inc. and Eugene F. Diamond, M.D. on this 25th day of January, 1979.

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